87-679

No. ____

SUPREME COURT, U.S.
FILED
OCT 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALAN MCSURELY,

Petitioner,

v.

GEORGE W. HUTCHISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND APPENDIX

MORTON STAVIS
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6425
Counsel for Petitioner

No. _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

ALAN McSURELY,

Petitioner,

v.

GEORGE W. HUTCHISON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND APPENDIX

Questions Presented

1. As to statutes of Limitations, are Bivens-type actions against federal officials subject to the same rules as are actions under 42 U.S.C., §1983 against state officials?

2. Does the Wilson v. Garcia rule, decided in 1985, which led the court below to apply a Kentucky one-year personal injury limitation statute to bar this Bivens-type action, apply

retroactively to this claim which was filed in 1981 in Washington, D.C. and then transferred to Kentucky, where the clearly established limitation for Bivens actions at the time of the commencement of the action was three years and five years respectively?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	vi
JURISDICTION	vi
CONSTITUTIONAL AND STATUTORY PROVISIONS	vii
STATEMENT	1
THE DECISION OF THE COURT OF APPEALS	8
ARGUMENT AND REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED ...	9
I. THERE IS A CONFLICT IN THE CIRCUITS WITH RESPECT TO THE APPLICATION OF WILSON v. GARCIA TO BIVENS CASES	9
II. THE APPLICATION OF THE GARCIA RULE RETROACTIVELY TO THIS CASE IS PARTICULARLY EGREGIOUS AND IS IN CONFLICT WITH THE POSITION OF THE NINTH CIRCUIT	14
Sixth Circuit Precedent	14
Wrong Circuit's Law Applied ..	16
CONCLUSION	21

TABLE OF AUTHORITIES

	Page
Agency Holding Corp. v. Malley-Duff and Associates, 107 S.Ct. 2759 (1987)	10
Bivens v. Six Unknown Agents, 91 S.Ct. 1999 (1971)	Passim
Carlson v. Green, 446 U.S. 26 (1980)	11
Chevron Oil Co. v. Hudson, 92 S.Ct. 349 (1971)	8,16
Eikenberry v. Callahan, 653 F.2d 632 (D.C.Cir. 1981)	19
Fitzgerald v. Seamans, 553 F.2d 220 (D.C.Cir. 1977)	18,19
Garner v. Stephens, 460 F.2d 1144 (1972)	15
Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986)	10,14, 20
Goodman v. Lukens Steel Co., 107 S.Ct. 2617 (1987)	10,14
Hobson v. Brennan, 625 F.Supp. 459 (D.D.C. 1985)	18
Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975)	15
McSurely v. McClellan, 426 F.2d 1178 (D.C.Cir. 1972); 553 F.2d 1277 (D.C.Cir. 1976); cert. granted 434 U.S. 888; cert. dism. as improvidently	

granted, 438 U.S. 189 (1978);
697 F.2d 309 (D.C.Cir. 1982);
753 F.2d 88 (D.C.Cir. 1985);
cert. den. 106 S.Ct. 525 (1985) .. 2, et passim

McSurely v. Ratliff,
389 U.S. 949 (1967);
390 U.S. 914 (1968);
390 U.S. 412 (1968);
398 F.2d 817 (6th Cir. 1968) 1,2

United States v. McSurely,
473 F.2d 1178 (D.C.Cir. 1972) 2

Wilson v. Garcia,
471 U.S. 261 (1985) ..... 7, et passim

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, dated July 24, 1987, is attached (1a)(Appendix A). The district court rendered three opinions relevant to this petition: December 11, 1985 (9a)(Appendix B); September 18, 1984 (19a)(Appendix C); and November 22, 1983 (37a)(Appendix D).

Alan McSurely petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit. It dismissed his suit for both equitable relief and damages against former FBI agent George W. Hutchison as time-barred by Kentucky's one-year statute of limitations for personal injury actions [KRS 413.140(1)(a)].

JURISDICTION

The judgment of the Court of Appeals was entered on July 24, 1987.

The jurisdiction of this Court is invoked under 28 US.C., §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First, Fourth and Fifth Amendments to the Constitution of the United States.

STATEMENT

This case is related to litigation which previously came before this Court. In 1967 petitioner was an anti-poverty worker in Appalachia. On August 11th, Thomas Ratliff, who was the Commonwealth Attorney of Pike County and a candidate for Lt. Governor of Kentucky, led a sheriff's posse of 15 men on McSurely's home. Ratliff seized a large quantity of personal papers and books and arrested petitioner and his then wife Margaret. They were charged with violation of Kentucky's anti-sedition statute, KRS 432.040. They immediately and successfully challenged the constitutionality of the statute. McSurely v. Ratliff, 282 F.Supp. 848 (E.D.Ky. 1967).

Thereafter, without a subpoena or notice to the McSurelys, Ratliff turned over copies of some personal letters, diaries, and other writings of the

McSurelys to a U.S. Senate subcommittee. These occurences and subsequent related developments resulted in extraordinarily complex litigation before this Court and the Courts of Appeal. McSurely v. Ratliff, 389 U.S. 949 (1967); 390 U.S. 914 (1968); 390 U.S. 412 (1968); 398 F.2d 817 (6th Cir. 1968); United States v. McSurely, 473 F.2d 1178 (D.C.Cir. 1972); McSurely v. McClellan, 426 F.2d 664 (D.C. Cir. 1970); 553 F.2d 1277 (D.C.Cir. 1976), cert. granted 434 U.S. 888, cert. dism. as improvidently granted, 438 U.S. 189 (1978); 697 F.2d 309 (D.C.Cir. 1982); 753 F.2d 88 (D.C.Cir. 1985), cert. den. 106 S.Ct. 525 (1985).

It is within this much-adjudicated fact-framework that the pertinent facts in Alan McSurely's complaint in this case against former FBI agent George W. Hutchison arose. Specifically, the complaint alleges that Hutchison carried

out an unconstitutional program of political surveillance and disruption against McSurely, who was organizing citizens of the Appalachian area and encouraging them to assert their political rights. Among the violations of McSurely's rights was the surreptitious taking of a set of documents which had been part of the sedition-raid seizure at the McSurely home in August 1967. Hutchison indeed testified that he "assumed" that the documents he acquired were part of the sedition-raid haul.

Petitioner alleged that Hutchison fraudulently "interviewed" McSurely on the pretext that Hutchison was trying to apprehend the persons who threw eight sticks of dynamite at McSurely's family home in December 1968. Hutchison then compiled a voluminous dossier of selectively edited and unverified reports and sent it to federal agencies,

including the Department of Health, Education and Welfare (HEW), where McSurely was seeking employment as a psychologist. A blacklist was allegedly set up on McSurely in HEW as a result of Hutchison's actions, despite the fact that three years before McSurely had held an important position in the federal anti-poverty program in Washington. This dossier is believed to continue to exist in various federal files, almost 20 years after it was written and five years after McSurely's name was supposedly vindicated in the long litigation of McSurely v. McClellan, supra. Its very existence continues to injure McSurely.

It was not until Hutchison was deposed in March 1981 in McSurely v. McClellan that the full nature of Hutchison's mission and program became known to the petitioner, even though the district court found that there had

earlier been sufficient knowledge to trigger the running of time for the purpose of a statute of limitations. The issue in this case is not a dispute as to the district court's factual finding; it is rather which statute of limitations applies.

This action was filed in the District Court for the District of Columbia on November 2, 1981 -- less than a year after those depositions were taken. The original complaint included as defendants, in addition to Hutchison, a number of government agencies located in the District of Columbia. On July 27, 1982, after all parties other than Hutchison were dismissed, the case was transferred to the Western District of Kentucky on venue considerations, pursuant to 28 U.S.C., §1406(a).

Hutchison subsequently moved for dismissal or, in the alternative, summary

judgment. On November 22, 1983, the District Court overruled a motion to dismiss various counts of the complaint as allegedly failing to state a cause of action. Proceeding to the issue of the defense of statute of limitations, the court gave a "tentative opinion" that the contents of this claim "do not bear a resemblance to any common-law torts" (50a) but invited further briefing on whether the Kentucky or District of Columbia statute of limitations applied. The court found that the McSurelys knew of "Hutchison and his involvement in this action, at least as early as September 24, 1979, and that this knowledge was implemented on July 15th and 31st, 1980" (45a-46a).

After additional briefing, the district court in its second opinion concluded that some of the claims "are not closely analogous to state tort

causes of action, but are, indeed, in a different category, i.e., a constitutional violation category, which has no direct relationship to tort theories of law" (35a). Citing two Sixth Circuit cases, the court applied KRS 413.120(2), a five-year Kentucky statute of limitations for an "action upon a liability created by statute, when no other time is fixed by the statute creating the liability" (30a-32a). This finding was dated September 18, 1984.

While the parties were preparing for trial, this Court in April 1985 handed down its opinion in Wilson v. Garcia, 471 U.S. 261 (1985).

In June 1985, the district court held that Garcia applied retroactively to this Bivens action, and selected the shorter of Kentucky's two personal injury statutes (one year v. five years) to

time-bar this claim (9a). Petitioner appealed to the Sixth Circuit.

THE DECISION OF THE COURT OF APPEALS

The Sixth Circuit panel concluded that "an action against a federal officer for violation of a plaintiff's constitutional rights is analogous to 42 U.S.C., §§1981 and 1983 actions commenced against a state officer" (5a). It accordingly applied the Garcia rule to this Bivens action.

On the retroactivity issue, the court stated that "there was just no basis under Chevron Oil Co. v. Hudson, 92 S.Ct. 349 (1971), for applying the limitations prospectively only. We are unable to conclude that any longer applicable statute had been clearly established for Bivens-type cases at the time plaintiff's cause of action arose here, which would make retroactive application of the rule unfair or

otherwise violative of the new principles of Chevron v. Hudson" (7a).

ARGUMENT AND REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED.

There is a division of the circuits upon the two questions presented by this petition, i.e., 1) whether Wilson v. Garcia should be applied to Bivens actions, and 2) whether, if Garcia is so applied, a retroactive application is appropriate.

I. THERE IS A CONFLICT IN THE CIRCUITS WITH RESPECT TO THE APPLICATION OF WILSON v. GARCIA TO BIVENS CASES.

This Court has recently given much attention to defining appropriate statutes of limitations for cases brought in the federal courts where no statute of limitations has been fixed by Congress. In Wilson v. Garcia the Court held that all §1983 actions should be characterized for the purpose of statute of limitations as involving claims for personal

injuries. In Goodman v. Lukens Steel Co., 107 S.Ct. 2617 (1987), the Court over vigorous dissent applied the same rule to suits under 42 U.S.C., §1981. In Agency Holding Corp. v. Malley-Duff and Associates, 107 S.Ct. 2759 (1987), the Court rejected an invitation to apply state statutes of limitations to private RICO suits and supplied instead the federal statute of limitations applicable to Clayton Act suits.

The Court has not addressed the question presented by this case, namely, what statute of limitations shall apply to Bivens actions and more specifically whether the Garcia rule selecting state statutes applicable to suits for personal injuries shall apply. On this point the circuits are divided -- the Ninth Circuit in Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986), being clearly in

conflict with the Sixth Circuit decision in this case.

The court below seems to have completely ignored this Court's opinion in Carlson v. Green, 446 U.S. 26 (1980), which dealt with the problem of annexing features of state law to Bivens actions. This Court there said:

> Section 1988 does not in terms apply to Bivens actions, and there are cogent reasons not to apply it to such actions even by analogy. Bivens defendants are federal officials brought into federal court for violating the federal Constitution. No state interests are implicated by applying federal law to them. While it makes some sense to allow aspects of 1983 litigation to vary according to the laws of the states under whose authority §1983 defendants work, federal officials have no similar claim to be bound only by the law of the state in which they happen to work.

446 U.S. at 25, n.11.

INSERT ATTACHED

When this Court decided Garcia it very carefully delved into the history of §1983. It clearly concluded that "the specific historical catalyst" for §1983

Precisely the same point is made in the very recent decision of the 7th Circuit, per Posner J., in distinguishing Bivens actions from 1983 actions, on the issue of "borrowing" State law as to when a cause of action is commenced. Del Raine v. Carlson 826 F.2d 698 at 706 (7th Cir 1987). Said the Court: "Section 1988 does not apply to this case since although...it is a civil rights suit it was not brought under any of the statutes to which that statute applies; a Bivens suit is brought under the Constitution directly not any statute".

was the campaign of violence and deception in the South fomented by the Ku Klux Klan." 105 S.Ct. at 1947. Under the circumstances, the Court's resort to statutes of limitations applicable to personal injury actions was quite understandable.

Bivens has a wholly different origin. Suits to enforce damage claims for violation of constitutional rights were not given full recognition until 1971 when this Court decided Bivens. As the Bivens case itself, the instant case, and innumerable other Bivens cases show, physical violence is rarely involved in these circumstances. Federal officials do not customarily use violence against the citizenry even when their actions result in a denial of constitutional rights. Indeed, it is wholly incongruous to apply the image of Klan violence to federal officials.

It would seem right and proper that Bivens actions call for the application of an appropriate and uniform federal statute of limitations. This is in the spirit and logic of Carlson v. Green, 446 U.S. 26. The accident of the locus or forum of a Bivens claim should be irrelevant to the statute of limitations to be applied. State officials are a totally different group of officials than federal officials.

Assuming, however, the Court would want to select a state limitations statute to apply to Bivens actions, it clearly should be that which the state would apply to a right created by statute -- e.g., the constitution as a fair analogy -- where no other statute is specified. That was the reasoning of the district court in this case before Garcia was decided.

In Gibson v. United States, 781 F.2d 1334, the Ninth Circuit expressly declined to adopt the personal injury statute of limitations to a Bivens action and instead applied a catch-all four-year limitations period. Id. at 1342.

In view of the clear conflict between the Sixth and the Ninth Circuits, the Court should grant this petition to resolve this issue.

II. THE APPLICATION OF THE GARCIA RULE RETROACTIVELY TO THIS CASE IS PARTICULARLY EGREGIOUS AND IS IN CONFLICT WITH THE POSITION OF THE NINTH CIRCUIT.

The essential point of a retroactivity analysis, succinctly stated just this year by this Court, is whether "the decision overruled clear Circuit precedent on which a complaining party was entitled to rely." Goodman v. Lukens Steel, 107 Sup.Ct. at 2621.

Sixth Circuit Precedent: When this suit was filed in 1981, Sixth Circuit law

had a clear precedent for cases of "constitutional violations": a five-year limitations period. Indeed, the district judge himself so ruled in 1984, saying these claims "are not closely analogous to state tort causes of action but are, indeed, in a different category, a constitutional violation category which has no direct relationship to tort theories of law" (35a). The court then relied on two Sixth Circuit cases, decided in 1972 and 1975, which applied Kentucky's five-year statute of limitations, Garner v. Stephens, 460 F.2d 1144 (1972), and Mason v. Owens-Illinois, Inc.,517 F.2d 520 (1975). The Sixth Circuit, however, without referring to the cases cited by the district court judge, said:

> We are unable to conclude that any longer applicable statute had been clearly established for Bivens-type cases at the time plaintiff's cause of action arose here, which would

make retroactive application of the rule unfair..." (7a)

It is obvious from the litigation chronology of this case that Garcia announced a new principle of law directly overruling the clear five-year precedent for "constitutional violations which have no direct relationship to tort theories of law" on which the district court judge relied just a year prior to Garcia. The post-Garcia contrary view should therefore not be retroactively applied.

Wrong Circuit's Law Applied: The court below wrongly applied its retroactivity analysis to Sixth Circuit law, rather than to the law of the District of Columbia Circuit.

The court below disposed of the forum transfer issue by saying,

> it would be inequitable, under Chevron standards, to permit the plaintiff to bring a suit in Kentucky that is barred by the Kentucky statute of limitations, upon the basis that he was originally justified, by a District

> of Columbia statute of limitations in bringing the action in the District of Columbia, which has no interest in the parties or the claim. (7a-8a; emphasis supplied.)

It may be true that the District of Columbia has no interest now but at the time of the filing, that jurisdiction had a direct and overpowering interest in this lawsuit, and it is at the time of filing that a retroactivity analysis must focus. At that time both McSurely and his ex-wife, Margaret, who was a co-plaintiff, lived in the Washington, D.C. suburbs and both worked in the District of Columbia -- she at Georgetown Hospital and he as a letter carrier out of the Friendship Post Office on Wisconsin Avenue. The three federal agencies which were defendants along with George Hutchison were headquartered in the District of Columbia. The HEW blacklist of petitioner which Hutchison allegedly caused was maintained in the

District of Columbia. And the continuing injuries to McSurely's reputation and employment possibilities flowing from the blacklist and Hutchison's voluminous files all had their impact in Washington, D.C.

The claim against Hutchison bore a remarkable resemblance to Fitzgerald v. Seamans, 553 F.2d 220 (1977), in which the D.C. Circuit applied a three-year limitation for Bivens actions. The three-year rule for Bivens actions in that Circuit, which handles the great majority of these relatively rare claims, is still the settled rule there. See Hobson v. Brennan, 625 F.Supp. 459, 461-462 (D.D.C. 1985), for a post-Garcia analysis of this issue.

In Fitzgerald, a Pentagon employee had "blown the whistle" on cost overruns in a Senate hearing and subsequently was fired. His suit, like McSurely's, was

about being deprived of a federal job and being placed on some sort of blacklist.

The McSurelys and their lawyers had every reason to believe that the three-year limitation applied in Fitzgerald would apply equally to their suit. This reliance was reinforced when, in April 1981, the Court of Appeals for the District of Columbia held again that the three-year limitations statute was "applicable to Bivens-type actions brought in the District of Columbia." Eikenberry v. Callahan, 653 F.2d 632 (D.C.Cir. 1981). Thus, it was a matter of settled law in the District of Columbia Circuit that a three-year statute of limitations applied to Bivens-type actions when this suit was filed in November 1981 in that Circuit -- and this law remains settled today, two years after Garcia.

In summation, both the Sixth Circuit and the D.C. Circuit had clear precedent for claims of constitutional violations: three and five years, respectively. Petitioner had no warning that a new principle of law, established about another genus of federal claims four years after his suit was filed, would upset either of these precedents.

Again the Court of Appeals for the Ninth Circuit in Gibson v. United States, 781 F.2d 1334, has made it absolutely clear that even if Garcia were to be applicable to a Bivens claim, "it would not apply a shorter statute of limitations retroactively to bar claims such as plaintiff's [Bivens claim] that were timely when filed." 781 F.2d at 1342, n.5.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON STAVIS
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, N.Y. 10012
(212) 614-6425
Counsel for Petitioner

Dated: New York, New York
October 22, 1987

TABLE OF CONTENTS TO APPENDIX

	Page
Opinion of the Court of Appeals for the Sixth Circuit, dated July 24, 1987 (Appendix A)	1a
Opinion of the District Court, dated December 11, 1985 (Appendix B)	9a
Opinion of the District Court, dated September 18, 1984 (Appendix C)	19a
Opinion of the District Court, dated November 22, 1983 (Appendix D)	37a

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-5047

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ALAN MCSURELY,
Plaintiff-Appellant,
v.
GEORGE W. HUTCHISON,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed July 24, 1987

Before: ENGEL, KRUPANSKY and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Plaintiff, Alan McSurely, appeals from a summary judgment dismissing his complaint in a *Bivens* action [*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971)] against the defendant, George W. Hutchison, a Kentucky resident and former agent in charge of the F.B.I., Louisville office, upon the ground that, under *Wilson v. Garcia,* 471 U.S. 261 (1985), applied retroactively in accordance with *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), plaintiff's claim was barred by Kentucky's one-year statute of limitations. Ky. Rev. Stat. Ann. § 413.140(1)(a) (Baldwin 1981).

Plaintiff initially filed this action, on November 1, 1981, in the United States District Court for the District of Columbia, which thereafter, pursuant to a consent decree, transferred the case to the United States District Court for the Western District of Kentucky, and also dismissed the complaint as to the other defendants, the Federal Bureau of Investigation, the Department of Health and Human Services, and the Office of Personnel Management.

Plaintiff's amended and supplemental complaint alleges that Hutchison violated his first, fourth, fifth, and ninth amendment rights by directing and conducting an unconstitutional surveillance and disruptive program against him, while he was employed from 1967 through 1969 by the Southern Conference Educational Fund in Pike County, Kentucky. Plaintiff was engaged in advising Appalachian residents of their economic and political rights. He alleges that Hutchison, as part of this unlawful surveillance, fraudulently interviewed plaintiff under the pretext of conducting an investigation for the purpose of apprehending and prosecuting unknown persons who had dynamited his home in December 1969; assembled a voluminous dossier of selectively edited and unverified reports, and forwarded those reports to other F.B.I. offices and security agencies in an effort to impede plaintiff's employment. He further alleges that Hutchison's purpose was to prevent employers from hiring him and that, as a result of Hutchison's information, the Department of Health and Human Services denied him employment, which he would otherwise have obtained and, also, noted that he should not be considered for any future employment. These actions are alleged to have caused plaintiff embarrassment, mental and emotional pain, loss of employment, and the disruption of his personal privacy and safety.

On September 18, 1984, the district court overruled defendant's motion for summary judgment. The district court characterized plaintiff's claims as being based upon direct violations of the federal constitution and held that Ky. Rev.

Stat. Ann. § 413.120(2) (Baldwin 1981), a five-year statute of limitations (for actions upon a liability created by statute, when no other time is fixed by the statute creating the liability), governed plaintiff's claims.

However, on December 11, 1985, the district court reversed itself and granted summary judgment in view of the Supreme Court's intervening decision in *Wilson*, which held that all 42 U.S.C. § 1983 actions should be characterized, for the purpose of statutes of limitations, as involving claims for personal injuries. The district court held that *Wilson* should be applied to *Bivens* claims because it was apparent from plaintiff's pleadings that he complained of the infliction of constitutional torts which are very similar to the constitutional torts which are actionable under 42 U.S.C. § 1983. The court accordingly applied the one-year Kentucky limitations period for personal injury torts, and ruled that *Wilson* should be applied retroactively to plaintiff's claim.

Plaintiff first contends that, regardless of the applicable statute of limitations, he did not have information sufficient to put him on inquiry notice and awareness of the person responsible for his injury until the time he took Hutchison's deposition on March 24 and 25, 1981, eight months prior to the filing of this action, and cites, in support of his argument, the cases of *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977), *citing Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Burnett v. Grattan*, 468 U.S. 42 (1984); and *Hobson v. Brennan*, 625 F. Supp. 459, 468 (D.D.C. 1985).

The pleadings and the evidence in the record indicate that, on September 13, 1978, a document was released by the F.B.I. to plaintiff and others, under the Freedom of Information Act, which stated that a document dated July 24, 1969, captioned "Alan (no middle initial) McSurely" had been provided to the Civil Service Commission and the Department of Health and Human Services, on August 4, 1969. The name

of the author, defendant Hutchison, was redacted from the report.

On September 14, 1979, in response to a request for a production of documents in the case of *McSurely v. McClennan*, 553 F.2d 1277 (D.C.C. 1976), *cert. dismissed*, 438 U.S. 189 (1978), the McSurelys provided defendants in that action with documents, among which were thirteen documents from the F.B.I. with the initials "G.W.H.," one document identifying George W. Hutchison in the text, and an F.B.I. report about Alan McSurely dated July 24, 1969, indicating on the first page a report made by George W. Hutchison. Also included in the production by the McSurelys in 1979 was an F.B.I. memorandum dated August 13, 1969, stating explicitly that the July 24, 1969 report was furnished to the Civil Service Commission and the Department of Health and Human Services on August 4, 1969.

Finally, in connection with discovery in the above cited case, plaintiffs, on July 15 and 31, 1980, deposed John A. Burke, an F.B.I. agent formerly assigned to Pikeville. In those depositions, plaintiffs used exhibits with the initials "G.W.H.," which Burke identified as standing for George W. Hutchison, and questioned Burke about Hutchison.

Plaintiff does not argue with these facts, only their significance. In view of plaintiff's own allegations that he became aware of the fact that he was a victim of wrongdoing by the F.B.I. and its agents on November 3, 1978, and of the undisputed fact that Hutchison's identity and involvement were pinpointed by the production of documents in September 1979, and the depositions of agent Burke in July 1980, we agree with the trial court's view that the record, when construed most favorably to plaintiff, leads inescapably to the conclusion that the limitations period began to run against plaintiff more than one year prior to the filing of his complaint on November 2, 1981.

Plaintiff next contends that the rule of *Wilson* should not be applied to *Bivens* actions.

Specifically, plaintiff argues that *Wilson* is expressly grounded in statutory construction and the legislative history surrounding the enactment of the Civil Rights Act; that *Bivens* actions, being creatures of federal common law, do not lend themselves to similar analysis; and that the underlying policy of *Bivens* is to maintain the proper balance between the personal liberties guaranteed by the Bill of Rights, and the effective exercise of power by the executive branch.

However, the fact that *Bivens* actions are not bound by a congressional enactment construed in the light of its legislative history, provides no rational basis for denying to defendants and courts the same statutory limitations protection that *Wilson* provides in § 1983 cases.

Further, insofar as the policies underlying limitations periods are concerned, we believe that an action against a federal officer for violation of a plaintiff's constitutional rights is analogous to 42 U.S.C. §§ 1981 and 1983 actions commenced against a state officer. *Butz v. Economou*, 438 U.S. 478 (1978). *Bivens* actions are not significantly dissimilar to claims brought under §§ 1981 and 1983 in terms of the interests being protected, the relief which may be granted, and the defenses which may be asserted.

The reasoning of *Wilson* and *Demery v. City of Youngstown*, No. 86-3261, slip op. at 16-17 (6th Cir. May 12, 1987), concerning 42 U.S.C. §§ 1981 and 1983 claims, respectively, appears to apply persuasively to the characterization of *Bivens* claims for purposes of applying statutes of limitations. The concurring opinion of Judge Guy in *Demery* is illuminating as to this point:

> Since there is a considerable overlap between what is covered under § 1981 and § 1983, *e.g.*, employment discrimination on the basis of race, it is not hard to visualize potential problems arising from different periods of limitation. If you have a six-year statute of limitations for § 1981 and a

> one-year statute for § 1983, you would have emasculated the limitations period for § 1983 cases in which such overlap exists. But, has not this historically always been the case? Technically "yes" but from a practical standpoint "no." It is not unusual for plaintiffs to sue as many defendants under as many different theories as is possible. For example, in civil rights actions, the combining of § 1981 with § 1983 and a liberal sprinkling of direct constitutional causes of action is the rule rather than the exception. When these cases were few in number this kind of shotgun approach was tolerated more often than not. Now that the federal courts are inundated with these cases, a judicial housecleaning is in order and indeed has begun. [Footnote omitted.]

Slip op. at 16-17.

Plaintiff also contends that, even if *Wilson* applies to *Bivens* cases, the applicable period should not be the one-year limitation of Ky. Rev. Stat. Ann. § 413.140(1)(a) (Baldwin 1981), for an "action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant" but, instead, should be the five-year limitations period of Ky. Rev. Stat. Ann. § 413.120(7) (Baldwin 1981), for an "action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated." Both the Supreme Court and this court have previously rejected similar arguments.

Wilson directed lower federal courts confronted with § 1983 actions to apply each state's statute of limitations for personal injury actions in determining whether the claims were time-barred. It pointed out that a catalog of other constitutional claims that has been alleged under § 1983 would encompass numerous and diverse topics and subtopics. The Supreme Court specifically refused to apply either the New Mexico statute which provided a three-year limitations period for actions for an injury to the personal reputation

of any person, or the New Mexico statute which provided a four-year limitations period for all other actions not otherwise provided for.

This court, faced with a choice of several Ohio statutes, chose the one-year Ohio statute applicable to libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice. *See Mulligan v. Hazard*, 777 F.2d 340 (6th Cir. 1985), *cert. denied*, 106 S.Ct. 2902 (1986). The only alternative limitation considered was the Ohio statute barring claims for bodily injury after two years. The court specifically rejected Ohio Rev. Code Ann. § 2305.09(D) (Anderson 1981), stating that it was "in the nature of a catch-all statute of limitations, as compared to sections 2305.10 and 2305.11, and is, therefore, inapplicable to federal rights actions brought under 42 U.S.C. §§ 1983 and 1985."

Finally, plaintiff argues that *Wilson* should not be applied retroactively, and that the three factors articulated in *Chevron Oil Co. v. Huson*, 404 U.S. at 106-07, when applied to this case, require this court to hold that it would be inequitable to bar his action.

In this case, the district court, after careful consideration, concluded that application of the *Chevron* factors does not warrant prospective application of *Wilson* to plaintiff's case. Assuming without deciding that the court was required to consider the *Chevron* factors in this appeal [*see, e.g., St. Francis College v. Al-Khazraji*, _ U.S. _, 55 U.S.L.W. 4626 (1987)], we agree with the district court that there was just no basis under *Chevron* for applying the limitations prospectively only. We are unable to conclude that any longer applicable statute had been clearly established for *Bivens*-type cases at the time plaintiff's cause of action arose here, which would make retroactive application of the rule unfair, or otherwise violative of the principles of *Chevron v. Huson*. Clearly, it would be inequitable, under *Chevron* standards, to permit the plaintiff to bring a suit in Kentucky that is barred by the Kentucky statute of limitations, upon the basis

that he was originally justified, by a District. of Columbia statute of limitations, in bringing the action in the District of Columbia, which has no interest in the parties or the claim.

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALAN McSURELY, Plaintiff, Civil Action C 82-0470-L(A)

v.

GEORGE W. HUTCHISON, Defendant.

MEMORANDUM OPINION

This action is submitted to the Court on the motion of the defendant, George W. Hutchison, to dismiss on the grounds that the action is barred by the Kentucky one-year statute of limitations for personal injury actions, KRS 413.140(1)(a). The motion is, in effect, a renewed one based on the statute of limitations and arises as a result of the Supreme Court's decent decision in Wilson v. Garcia, 105 S.Ct. 1938 (1985).

Before discussing that case and other cases which control the decision of the Court, it will be recalled that in the previous opinion dealing with the

statute of limitations, this Court held that plaintiff knew of Hutchison and his involvement in the matters complained of in this action at least as early as September 24, 1979, and that this knowledge was implemented on July 15 and 31, 1980 when plaintiff deposed FBI Special Agent Burke, used exhibits with the initials "GWH", and questioned Burke about defendant Hutchison. It further will be recalled that the plaintiff's action was not filed until November 2, 1981.

It also will be recalled that plaintiff's complaint alleged that the action arose under the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States and under federal law. In the heading of the complaint, plaintiff states that his complaint, among other things, is for violation of constitutional rights of

freedom of speech and association, privacy, due process, and privileges and immunities of citizenship. The factual allegations contained in the complaint insofar as the defendant Hutchison is concerned are that he, in his capacity as an FBI agent, relayed certain false information about plaintiff to various government agencies; and as a result thereof, plaintiff was never hired by those agencies to which he had sought employment.

As Hutchison was an FBI agent at all times pertinent to the allegations made in the complaint, it seems obvious that plaintiff has alleged a constitutional type of tort analogous to the claims made by the plaintiffs in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

Wilson v. Garcia holds that a plaintiff who has brought an action under

Title 42 U.S.C. §1983 must bring it within the time limits set out by the state statute of limitations for the recovery of damages for personal injuries. 105 S.Ct. at 1947. Plaintiff argues that Wilson v. Garcia should not be applied retroactively, and further, that its holding is not applicable to a Bivens type tort. Plaintiff further argues that this Court should apply the principles of Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971). In Chevron the Supreme Court held that three factors were to be considered in deciding whether a new court decision in a civil case should be applied only prospectively. The first is whether the decision established a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly

foreshadowed. The second is whether retroactive application would further or retard application of the new rules, and the third is whether retroactive application would result in substantial injustice to the parties.

In considering the first criterion, it is interesting to note that in the Sixth Circuit, both the one year and five year statutes of limitations have been applied to 42 U.S.C. §1983 actions for wrongful denial of employment. In Garcia the Supreme Court also referred to this inconsistency, and it is apparent that no clear past precedent in this circuit controlled the question of which statute of limitations to apply.

With reference to the second prong of the first criterion, the decision in Lester Smith v. City of Pittsburgh, 764 F.2d 188 (3rd Cir. 1985), holds that even though the Supreme Court had not signaled

or foreshadowed its disapproval of the application of differing limitation periods to different types of §1983 claims, plaintiff did not satisfy the first Chevron factor because the application of the law had been erratic without clear precedent on which plaintiff could have reasonably relied in waiting to file suit. We note that Lester Smith is distinguishable from Jackson v. City of Bloomfield, 731 F.2d 652 (10th Cir. 1984), and Abbitt v. Franklin, 731 F.2d 661 (10th Cir. 1984), where the Tenth Circuit declined to apply its decision in Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984) (en banc), retroactively because plaintiffs could have justifiably relied on that court's prior precedent.

Despite its holding as to the first criterion, the Court in Lester Smith went on to weigh the merits of the case before

it by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation would further or retard its operation. 765 F.2d at 195. The Court noted that although it could not say that the policies referred to in Wilson v. Garcia militate clearly in favor of retroactive application, neither did they militate against such application. The Court also pointed to its decision in Perez v. Dana Corporation, 718 F.2d 581 (3rd Cir. 1983), where it applied retroactively the six month statute of limitations established in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983).

Finally, in ruling on the third factor in Chevron, the Lester Smith Court held that plaintiff could not have reasonably relied on the assumption that a two year statute of limitations would

apply to his §1983 claim of termination without due process. The Court also noted that the defendant (just as defendant Hutchison here) had consistently maintained that plaintiff's cause of action was time-barred. Likewise, it pointed out that the case neither had been tried nor had there been massive discovery.

After considering all the Chevron factors, we believe that retroactive application is warranted with regard to plaintiff's claims unless we accept his argument that a constitutional tort of the Bivens type is dissimilar to claims under 42 U.S.C. §1983. However, this argument is not well taken because it is apparent from plaintiff's pleadings that he is complaining of the infliction of constitutional torts which are very similar to the constitutional torts which are actionable under 42 U.S.C. §1983.

Finally, we note that in Lawson v. Truck Drivers, Chauffeurs & Helpers, 698 F.2d 250 (6th Cir.), cert denied, 104 S.C. 69 (1983), the Sixth Circuit held that the Supreme Court's decision in United Parcel Service v. Mitchell, 451 U.S. 56 (1981), was not the "clean break" with past precedent which Chevron had contemplated for prospective only application, but rather, was simply a clarification or "attempt to impose a single policy and a single rule in a legally chaotic situation." 698 F.2d at 254. The decision was intended to resolve widespread confusion in the circuits concerning the applicable statute of limitations. Id.

We believe the reasoning in Lawson with reference to Mitchell is applicable here because the Supreme Court's decision in Garcia likewise represents an attempt to impose a single policy and a single

rule in a legally chaotic situation" and is not a clean break with past precedent. Therefore, plaintiff's complaint will be dismissed with prejudice.

A judgment in accordance with this opinion will be entered this day.

Dated: 12-11-85

s/
Charles M. Allen, Senior Judge

cc: Counsel of Record

ENTERED
Dec. 11, 1985
Jesse W. Grider,
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALAN MCSURELY, et al.,

Plaintiffs,

-against- CIVIL ACTION

NO. C 82-0470 L(A)

GEORGE W. HUTCHISON,

Defendant.

MEMORANDUM OPINION

This action is submitted to the Court on the motion of the defendant for summary judgment based upon his claim that Counts 4, 5, 6, and 8 of the complaint are barred by the statute of limitations. It should further be noted that the Court has already sustained defendant Hutchison's motion to dismiss as to Courts 1, 2, 3, and 7.

This action was originally filed in the District of Columbia against various governmental agencies who have now been dismissed, including the Federal Bureau of

Investigation, and against defendant Hutchison, who was sued as a resident of Louisville, Kentucky. The only remaining defendant in the action is described as living in Arlington, Virginia. Of course the governmental agencies were designed as being located in Washington, D.C.

The complaint and the discovery taken since the institution of the complaint establishes that Hutchison was, at all time pertinent, located in Lousiville, Kentucky as the FBI Agent-In-Charge there. All of the reports which Hutchison wrote were filed in Louisville, Kentucky. The position, of which the plaintiff Alan McSurely complains he was deprived by reason of the conduct of Hutchison and the codefendants, was a position with a federal agency whose local office was located in Kentucky.

Judge William Bryant of the District Court of the District of Columbia, after

dismissing the action as to the governmental agencies, transferred it to this Court as to the suit against Hutchison. This Court believes that the proper statutes of limitations to apply are those of Kentucky and not the District of Columbia. it is apparent from what has been said above that all of Hutchison's actions took place in Kentucky, and that whatever damaging effects they had, took place first in Kentucky although later, when plaintiff moved, they may have had a detrimental effect in the District of Columbia and other jurisdictions.

Coming first to Court 8, which is entitled "Civil Conspiracy," and which charges that defendants acted in a concerted fashion to make false and fraudulent misrepresentations of fact, and to violate plaintiff's constitutional rights to freedom of speech, association, privacy, due process, and the privileges

and immunities of citizenship, it is apparent that this cause of action is barred by KRS 413.140(1)(c), which provides a one year limitation period for conspiracy actions.

The 4th, 5th and 6th causes of action are entitled respectively "Violation of Constitutional Rights of Free Speech and Association," "Violation of Constitutional Right to Privacy," and "Violation of Constitutional Right to Due Process of Law." The first of these incorporates Paragraphs 1-33, the second Paragraphs 1-36, and the third Paragraphs 1-40.

Paragraph 13 states that Hutchison "proceeded, upon learning of plaintiff McSurely's application, to assemble alleged information about plaintiffs and to convey it to CSC, HEW, and other agencies. The information that was conveyed related to the personal and political activities of plaintiffs, was in

important respects false and slanderous, and implied that plaintiff McSurely was a violent and criminal person, a threat to national security, and not fit for the position of Assistant Psychologist, NIMH [National Institute of Mental Health]."

In Paragraph 20, it is alleged in part that plaintiff "had been denied employment because of his political activities and beliefs, that false and malicious information had been circulated about him...."

Again, in Paragraph 22, plaintiff states that he "learned, for the first time, of the central and direct involvement of agent Hutchison, the widespread publication of derogatory information, and other material facts." Thus, it can be observed that in each instance, where plaintiff has alleged a violation of his constitutional rights, he has asserted that those rights were

violated by reason of the dissemination of false, malicious and derogatory information by defendant Hutchison.

The defendant contends that the Court should take the position that all of the plaintiff's claims are based upon the allegation that the defendant published libelous and slanderous remarks about plaintiff, which prevented plaintiff from obtaining employment. In other words, the defendant is contending that the plaintiff cannot divide up his claim against the defendant into separate constitutional causes of action for the purpose of the statute of limitations, but that each of his claims must be considered as being based only upon the libel and slander.

The defendant relies heavily upon the case of Lashlee v. Sumner, 570 F.2d 107 (6th Cir. 1978). Lashlee was a diversity action where the complaint charged that the defendant was employed as a consulting

psychologist by plaintiff's employer, and that following an interview with plaintiff, the defendant sent a written evaluation to the employer which contained libelous statements which were false and untrue. The District Court dismissed the complaint on the grounds that it was barred by the one-year statute of limitations as to actions for libels. KRS 413.140(1)(d).

The plaintiff contended that it was error to dismiss the action, since the libel claim was one of four distinct causes of action which he pled. The other three were for negligence or malpractice, interference with contractual relations and intentional infliction of emotional distress. The Court noted that in each count, the plaintiff related the injuries for which damages were sought to the delivery of the report to plaintiff's employer. The Court of Appeals stated "in

Kentucky that a statute of limitations which specifically mentions a recognized tort applies to all actions founded on that tort regardless of the method by which it is claimed the tort has been committed." Id., at 109.

The Court also held that "Kentucky also observes the related rule that a specific statute of limitations covers all actions whose real purpose is to recover for the injury addressed by it in preference to a general statute of limitations. [citing Carr v. Texas Eastern Transmission Corp., 344 S.W.2d 619 (Ky. 1961]." Id., at 109. The Court of Appeals went on to hold that the gist of the entire action was the libel, and that the District Court properly held that the one year statute of limitations applied to all courts.

Interestingly enough, although neither party has cited the case for this proposition, Lashlee v. Sumner, super,

holds that the tort occurred when the slander was uttered and not when it was discovered. In the instant case, the allegedly false report of Hutchinson took place in 1969 although not discovered by plaintiff until 1978 or 1979. However, the Lashlee Court did go on also to hold that summary judgment was not appropriate where concealment of the cause of action was involved. Since the plaintiff here has alleged concealment of the cause of action, the time of applying the statute of limitations does not begin until the actual discovery of the report by plaintiff took place.

In the case of Church of Scientology of California v. Foley, 640 F.2d 1335 (D.C. Cir. 1981) the en banc panel of the District of Columbia Court of Appeals affirmed the District Judge's judgment. The District Judge held that the action of the appellant for money damages against

four federal employees was barred because it was brought after more than one year, and because the suit was based on a defamation claim. However, in a dissenting opinion by three of the Judges, it was pointed out that the memorandum which led to the filing of the lawsuit was written by a government employee reporting that drugs were used by the church members, electric shock was used, and that sever persons had been shot, though not killed, because they objected to the membership of their teenage children in the church. The memorandum was forwarded to other government officials who were also made defendants.

The Church, in its complaint, averred that these events infringed its First Amendment right to freely exercise its religious beliefs and also violated its Fifth Amendment right to due process of law. The dissenting opinion suggests on

page 1342 and 1343 that if the Church's claim of First and Fifth Amendment violations was valid, the three-year limitations of the District of Columbia, rather than the one-year limitations for libel suits, should have governed. The dissent did not decide that question, but in footnote 57 strongly suggests that the causes of action for money damages may be implied directly from the Constitution.

While the majority opinion in Church of Scientology, supra, indicates that the Court of Appeals for the District of Columbia Circuit is of the opinion that in situations similar to those in the case at bar, the statute of limitations applying to libel rather than a general statute should be applied, we believe that the Court of Appeals for the Sixth Circuit would reach a different conclusion. Our belief is based upon the court's opinions in Mason v. Owens-Illinios, Inc., 517 F.2d

520 (6th Cir. 1975) and Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1972). In those two cases, which were based upon alleged violations of 42 U.S.C. §1981 and 42 U.S.C. §1983, the Sixth Circuit held that the proper Kentucky statute of limitations to apply was KRS 413.120(2). That Statute reads as follows:

> The following actions shall be commenced within five years after the cause of action accured:
>
> ****
>
> (2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

In the recent case of Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), the court held that there is a fundamental difference between a civil rights action and a common law tort. Id., at 336. It is noted also in Beard at page 337, n.7, that the Sixth Circuit has applied state limitation periods for statutory actions

in cases brought under the Civil Rights Act. The Court specifically notes that this was done in Mason, supra, and Garner, supra, contrary to previous holdings of the Sixth Circuit in Madison v. Wood, 410 F.2d 564 (6th Cir. 1969); Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, 1028 (6th Cir. 1968); and Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968).

In Garner, supra, plaintiff brought her action under 42 U.S.C. §1983 contending that a regulation which required pregnant teachers to take a full year's leave of absence was in violation of her civil rights. The court held that plaintiff was not claiming any injury to her person, but was claiming a statutory right; and, therefore, her action was not barred by the one-year tort statute of limitations. In Mason, supra, plaintiff brought his action under 42 U.S.C. §1981 claiming that the company unlawfully discriminated

against him because of his race, but the Court of Appeals for the Sixth Circuit stated that plaintiff's action was founded upon a federal statute creating a cause of action unknown at common law. Therefore, the general statute of limitations, which provided a six-year period for the bringing of suits upon liability created by statute, governed the action.

In a very interesting and instructive case entitled McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983), the court reviewed in considerable detail previous holdings of the District of Columbia as to what statute of limitations should be applied where a constitutional tort was involved. The court, in doing so, referred to the case of Eikenberry v. Callahan, 653 F.2d 632, 635, n.11 (D.C. Cir. 1981), where the court pointed out that the action sought damages, not for assault but for a violation of the First Amendment, which

bears no resemblance to any of the common law torts listed in the District of Columbia Code. Likewise, the court stated that the general statute of limitations for liabilities founded on statute rather than a common law tort statute of limitations was applicable. Id., at 372.

Again, the McClam, supra, court referred to Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977), where an unlawful conspiracy to deprive plaintiff of his job was alleged, and where the parties argued that the three-year general statute applied. Id., at 372. The court also referred to Macklin v. Spector Freight Systems, 478 F.2d 979, 994 (D.C. Cir. 1973), where the court applied the general statute to a federal civil rights claim which was for racial discrimination and clearly not analogous to a common law tort. Id., at 372.

We believe that the pleadings in the

case at bar should be properly characterized as being based upon direct violations of the Federal Constitution. If this characterization is correct, it then follows that the causes of action alleged by the plaintiff are not closely analogous to state tort causes of action, but are, indeed, in a different category, i.e., a constitutional violation category, which has no direct relationship to tort theories of law. Therefore, we believe that the facts in Garner v. Stephens, supra, and Mason v. Owens-Illinois, supra, and the pleadings discussed in those cases, bear a closer resemblance to the case at bar than they do to the pleadings discussed in Lashlee v. Sumner, supra, and the pleadings discussed in Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977). Therefore, we must conclude that the claims of the plaintiff in Counts 4, 5 and 6 are not time barred.

In light of the Court's holding, it follows that plaintiff should be given leave to amend his complaint to make additional allegations pertaining to alleged violations of his civil rights. Leave to amend a complaint is, of course, freely given and is denied usually only when prejudice can be shown by the opposite party. In this action, the case has not yet been set for trial, and defendant cannot show prejudice within the meaning of Rule 15, Federal Rules of Rules of Civil Procedure.

An order in accordance with this memorandum opinion will be entered this day.

Dated: Sept. 18, 1984

Charles M. Allen, Chief Judge

cc: Counsel of Record

APPENDIX D

B18755

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALAN McSURELY, et al.,

Plaintiffs, CIVIL ACTION

-against- No. C 82-0470 L(A)

GEORGE W. HUTCHISON, et al.,

Defendants.

MEMORANDUM OPINION

This action is submitted to the Court upon the motion of the defendant Hutchison to dismiss or, in the alternative, for summary judgment. The complaint consists of nine causes of action, the first of which does not involve the plaintiffs. As to the eight other causes of action, defendant asserts that the statute of limitations for libel and slander bars each of

these since the suit was not brought in the District Court for the District of Columbia until November 2, 1981, and since it is alleged that plaintiff had knowledge of all the necessary facts as early as 1978, or, at the latest, 1979. The motion of the defendant also sets out various reasons why the last eight causes of action should be dismissed.

The complaint alleges that plaintiffs were civil rights organizers prior to 1969, and that defendant Hutchison, upon learning of plaintiff McSurely's application for employment with the Clinical Research Center of the National Institute of Mental Health, Lexington, Kentucky, conveyed false and slanderous information to the Office of Personnel Management of the United States, implying that plaintiff was a violent and criminal person, and

a threat to national security.

The next paragraph in which Hutchison is implicated is Paragraph 22, where plaintiffs claim that they first learned of Agent Hutchison's involvement in March 1981 when they took his deposition.

The next paragraph which relates to Hutchison is Paragraph 30, which alleges that Hutchison and other defendants for lengthy periods of time intentionally and maliciously interfered with the business advantage of plaintiff McSurely. That cause of action must be dismissed. See Grange v. Marek, 583 F.2d 781 (6th Cir. 1978).

Plaintiff's third cause of action alleges an intentional infliction of severe emotional distress by Hutchison and the other defendants. Again, this is a common law tort as to which

Hutchison enjoys absolute immunity. See Grange v. Marek, supra.

The next paragraph in which Hutchison is involved is arguably Paragraph 35, where it is stated that by reason of denying plaintiff McSurely's employment application for the purpose of investigating his political beliefs, defendants violated his rights under the First Amendment to freedom of speech and freedom of association.

The fifth cause of action alleges that defendants, including Hutchison, violated plaintiffs' right to privacy under the First, Fourth, Fifth and Ninth Amendments.

The sixth cause of action alleges that defendants' actions deprived the plaintiffs of liberty and property without due process.

The seventh cause of action alleges that defendants maliciously violated plaintiffs' constitutional rights to the privileges and immunities of citizenship.

The eighth cause of action alleges a conspiracy to violate plaintiffs' constitutional rights to freedom of speech and association, privacy, due process and the privileges and immunities of citizenship, and to fraudulently conceal these actions from plaintiffs.

Finally, the ninth cause of action is a prayer for punitive damages.

The undisputed facts regarding the statute of limitations are as follows. The plaintiffs in their complaint allege in Paragraph 20 that on or about November 3, 1978 they received certain documents pursuant to an FOIA request.

They further state that only upon reading these documents did plaintiffs learn that defendants had committed various acts of wrongdoing, that McSurely was denied employment because of his political activities and beliefs, that false and malicious information had been circulated about him, or that a permanent blacklist had been in effect ever since 1969.

Plaintiff, in Paragraph 22, states that in March 1980, in connection with McSurely v. McAdams, et al, Civil Action No. 516-69 (D.D.C.), plaintiffs took the deposition of defendant Hutchison and learned for the first time of the central and direct involvement of Agent Hutchison, the widespread publication of derogatory information and other material facts.

On September 13, 1978, an FBI

document was furnished to the plaintiffs which stated that an FBI report dated July 24, 1969 captioned "Alan (no middle initial McSurely" was furnished to the Civil Service Commission and the Department of Health, Education and Welfare, hereinafter HEW, on August 4, 1969. However, the name of the author, George W. Hutchison, was redacted from this report which was furnished to the McSurelys.

Defendants also claim that while the name of the defendant Hutchison was redacted in a thirty-page report involving the dynamiting of the McSurely's home, defendant Hutchison's initial and full name appear. However, this report is apparently a different report than the one furnished to HEW, which is the subject-matter of this

lawsuit.

On September 14, 1979, in response to a request for production of documents in the case of Alan McSurely, et al., v. John K. McClellan, Executor of the Estate of John L. McClellan, et al., Civil Action No. 516-69 (D. D.C.), 533 F.2d 1277 (D.C. Cir. 1976), cert. dism. as improvidently granted, 438 U.S. 189 (1978), the McSurelys provided the defendants in that action with documents, among which were 13 documents from the FBI with the initials "GWH," one document identifying George W. Hutchison in the text, and an FBI report about Alan McSurely dated July 24, 1979, indicating on the first page a report made by George W. Hutchison. See Exhibit C attached to defendants' motion for summary judgment. Also included in the production by the

McSurelys in 1979 was an FBI memorandum dated August 13, 1969 stating explicitly that the July 24, 1969 report was furnished to the Civil Service Commission and HEW on August 4, 1969. See Exhibit C.

Again, in connection with discovery in McSurely v. McAdams, supra, plaintiffs deposed John A. Burke on July 15, 1980 and July 31, 1980, Mr. Burke being an FBI Agent formerly assigned to Pikeville. In those depositions, plaintiffs used exhibits with the initials "GWH," which Mr. Burke identified as standing for George W. Hutchison, and questioned Mr. Burke about Hutchison. There can be no doubt that defendants knew of Hutchison and his involvement in this action, at least as early as September 24, 1979, and that this knowledge was implemented

on July 15th and July 31st, 1980. Suit was filed in the District of Columbia District Court on November 2, 1981.

The Supreme Court has mandated in cases involving 42 U.S.C. §1981 et seq. that the federal courts use the state statute of limitations which is most closely analogous to the cause of action pleaded by the plaintiff. See Johnson v. Railway Express Agency, 421 U.S. 454, (1962). See also,, McClam v. Barry, 697 F.2d 366, 371-376 (D.C. Cir. 1983). Those cases, as well as that of Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977), are clear authority for the conclusion that cause of action number eight must be dismissed if the Kentucky statute of limitations is to be applied. The eighth cause of action alleges a conspiracy, as did the plaintiff's complaint in Carmicle; and

the Sixth Circuit held that KRS 413.140(1)(c), which relates specifically to a one-year cause of action for conspiracy, applied.

However, in the District of Columbia, the applicable statute of limitations for conspiracy causes of action is three years. See Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977), where the court agreed with the parties that the action was primarily for an unlawful conspiracy to deprive plaintiff of his job.

The defendants argue that the action filed by the plaintiff here is most closely analogous to a libel and slander action. If defendants are correct in that assertion, then the action is barred by virtue of both Kentucky's statute of limitations of one year, see KRS 413.140(d) and by the

District of Columbia's one year statute of limitations, D.C. Code §12-301(4), which specifies a one-year period for action for libel and slander, etc. The Court has not been furnished with an indepth discussion of whether or not it should apply the Kentucky statute of limitations or the District of Columbia statute of limitations. It is most important that such a discussion be had before the Court makes any final decision as to the applicable statutes of limitations. The Court would observe that if the District of Columbia statute of limitation applies, it would then be clear that at least as to cause of action number eight, plaintiffs are not barred by limitations.

At this point, it would not seem advisable to indulge in a complete analysis of defendants' argument that

all of the causes of actions asserted by the plaintiffs are most closely analogous to a libel and slander action. It is apparent, of course, that this is not true as to the conspiracy count, and while the complaint does spell out the making of false and slanderous statements by defendant Hutchison, which resulted in the blacklisting of plaintiff McSurely, it alleges many different causes of action based upon alleged violations of First, Fourth, Fifth, Ninth and Fourteenth Amendment rights. As the court in McClam v. Barry, supra, pointed out, an action for a violation of the First Amendment bears no resemblance to any of the common-law torts listed in D.C. Code §12-301(4). Id. 372.

We are inclined at this juncture to the tentative opinion that some of the

causes of action pleaded by plaintiffs do not bear a resemblance to any of the common-law torts, even though allegedly the libelous and slanderous communications triggered the events which led to the alleged violations of the First Amendment and other constitutional rights. The parties are invited to address the question of the closely analogous statutes again, in light of this opinion, and in light of the McClam analysis of Fitzgerald v. Seamans, supra, a case which, in its factual content, is somewhat similar to the case at bar, and which held, in that case, that the action was primarily for unlawful conspiracy.

Defendants' motion to dismiss on the merits for failure to state a cause of action, the fourth and fifth causes of action, is overruled. It has been

repeatedly held that the Government may not deny a citizen a job purely because of his associations with organizations which are not illegal, but are suspect of having viewpoints different to those commonly held by the general public. See Jenkins v. McKeithen, 395 U.S. 411 (1969); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 124 (1951); and United States v. Lovett, 3228 U.S. 303 (1946).

With reference to the fifth cause of action, the case of McSurely v. McClellan, supra, stands for the proposition that plaintiffs are entitled to be free from the use of any documents or information which was garnered as the result of an unlawful search. Since the documents which were seized from the McSurelys in 1969 were held to have been unlawfully seized, neither

the FBI nor any other Government agency, under the holding in McSurely v. McClellan, supra, has any authority to disseminate information from those particular documents.

With reference to the sixth cause of action, defendant's motion to dismiss for failure to state a cause of action must be overruled. See Brown v. Bronstein, 389 F.Supp. 1329 (S.D.N.Y. 1975).

Defendant's motion to dismiss the seventh cause of action for failure to state a cause of action is well taken. That cause of action is based on an allegation of deprival of the privileges and immunities of citizenship guaranteed by Article IV of the United States Constitution. Article IV pertains to the rights of citizens not to be discriminated against by state

governments.

Finally, we note that the complaint does not have any specific allegations as to Margaret Herring-McSurely being injured in any way by the actions of defendant Hutchison. It is obvious that she has alleged no injures to herself, and thus she must be dismissed as a party-plaintiff.

A partial judgment in accordance with this opinion will be entered this day.

Dated: 11/22/83

s/
Charles M. Allen,
Chief Judge

cc: Counsel of Record

FILED
FEB 12 1988

No. 87-679

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALAN MCSURELY, PETITIONER

v.

GEORGE W. HUTCHISON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JOHN F. CORDES
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals erred in affirming the dismissal of this *Bivens* action on the ground that the suit was precluded by Kentucky's one-year statute of limitation for personal injuries.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 2, 5
Butz v. *Economou*, 438 U.S. 478 (1978) 5
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 4, 7
Chin v. *Bowen*, 833 F.2d 21 (2d Cir. 1987) 6
Ellis v. *Blum*, 643 F.2d 68 (2d Cir. 1981) 5
Forrester v. *White*, No. 86-761 (Jan. 12, 1988) 5
Garner v. *Stephens*, 460 F.2d 1144 (6th Cir. 1972) 7
Gibson v. *United States*, 781 F.2d 1334 (9th Cir. 1986), cert. denied, No. 86-676 (Jan. 20, 1987) 6, 8
Goodman v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987) 5-6, 7, 8
Lake Country Estates, Inc. v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) 5
Marshall v. *Kleppe*, 637 F.2d 1217 (9th Cir. 1980) 6, 8
Mason v. *Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975) 7
Saint Francis College v. *Al-Khazraji*, No. 85-2169 (May 18, 1987 8
Smith v. *Pittsburgh*, 764 F.2d 188 (3d Cir.), cert. denied, 474 U.S. 950 (1985) 8
Wilson v. *Garcia*, 471 U.S. 251 (1985) 2, 4, 5

Statutes:

42 U.S.C. 1981 ..... 6, 7
42 U.S.C. 1983 ..... 2, 3, 5, 6, 7
Cal. Civ. Proc. Code § 343 (West 1982) 6

Statutes—Continued: Page

Ky. Rev. Stat. Ann. (Michie/Bobbs-Merrill 1972 & Supp. 1986):
§ 413.120(7) 4
§ 413.140(1)(a) (& Supp. 1986) 1-2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-679

ALAN MCSURELY, PETITIONER

v.

GEORGE W. HUTCHISON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 823 F.2d 1002. The opinions of the district court (Pet. App. 9a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1987. The petition for a writ of certiorari was filed on October 22, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 413.140(1)(a) of the Kentucky Revised Statutes Annotated (Michie/Bobbs-Merrill 1972 & Supp. 1986) provides:

> Actions to be brought within one year. — (1) The following actions shall be commenced within one (1) year after the cause of action accrued:

(a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant.

STATEMENT

On November 2, 1981, petitioner and his former wife initiated this suit in the United States District Court for the District of Columbia against the Federal Bureau of Investigation (FBI), the Department of Health and Human Services, the Office of Personnel Management, and respondent George W. Hutchison, a former FBI agent. As the result of several rulings[1] (none of which were appealed), petitioner emerged as the sole plaintiff, respondent emerged as the sole defendant, and petitioner's claims rested solely on allegations that respondent was liable in damages, under the principles of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), for violation of petitioner's constitutional rights.

While petitioner's action was pending, this Court decided *Wilson* v. *Garcia,* 471 U.S. 261 (1985), which held that the timeliness of actions brought under 42 U.S.C. 1983 alleging deprivation of constitutional rights is determined by reference to state statutes of limitation governing tort claims for personal injuries. Respondent requested the district

---

[1] The court initially dismissed the action against the three government agencies and transferred the remaining claims against respondent to the United States District Court for the Western District of Kentucky. On November 22, 1983, that court dismissed the wife's complaint and four counts of petitioner's complaint (Pet. App. 37a-53a). The district court denied respondent's motion to dismiss four other counts and ordered supplemental briefing on the statute of limitation issues regarding those counts (*id.* at 50a). On September 18, 1984, the district court ruled that one of the remaining counts was barred by the statute of limitation (*id.* at 22a) but that three other counts were not (*id.* at 35a). The district court also granted petitioner's motion for leave to file an amended complaint (*id.* at 36a).

court to reconsider its previous statute of limitation ruling in light of *Wilson*. On December 11, 1985, the district court granted respondent's motion and dismissed petitioner's action with prejudice. Pet. App. 9a-18a. The court concluded that this Court's reasoning in *Wilson* concerning actions brought under 42 U.S.C. 1983 was equally persuasive in *Bivens* actions (Pet. App. 16a). It accordingly held (*id.* at 18a) that petitioner's action was precluded by Kentucky's one-year statute of limitation for personal injuries. See Ky. Rev. Stat. Ann. § 413.140(1)(a) (Michie/Bobbs-Merrill 1972 & Supp. 1986).[2]

The court of appeals affirmed the district court's decision. It first observed that the district court was correct in finding that "the record, when construed most favorably to [petitioner], leads inescapably to the conclusion that the limitations period began to run against [petitioner] more than one year prior to the filing of his complaint" (Pet. App. 4a). Next, the court of appeals determined that "an action against a federal officer for violation of a plaintiff's constitutional rights is analogous to 42 U.S.C. §§ 1981 and 1983 actions commenced against a state officer" (Pet. App. 5a). The court accordingly held that "[t]he reasoning of *Wilson* * * * appears to apply persuasively to the characterization of *Bivens* claims for purposes of applying statutes of limita-

---

[2] The court specifically found that petitioner's cause of action accrued more than one year before the suit was filed, stating (Pet. App. 9a-10a):

> [I]n the previous opinion dealing with the statute of limitations, this Court held that plaintiff knew of Hutchison and his involvement in the matters complained of in this action at least as early as September 24, 1979, and that this knowledge was implemented on July 15 and 31, 1980 when plaintiff deposed FBI Special Agent Burke, used exhibits with the initials "GWH," and questioned Burke about defendant Hutchison. It further will be recalled that the plaintiff's action was not filed until November 2, 1981.

tions" (Pet. App. 5a) and affirmed the district court's selection of the one-year Kentucky statute of limitation for an "action for an injury to the person" (Ky. Rev. Stat. Ann. § 413.140(1)(a) (Michie/Bobbs-Merrill 1972 & Supp. 1986)) in place of Kentucky's five-year period for "an action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated" (*id.* § 413.120(7) (Michie/Bobbs-Merrill 1972)). Pet. App. 6a.

The court of appeals rejected petitioner's contention that this Court's decision in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), required that the one-year limitation period apply "prospectively only" (Pet. App. 7a). The court determined that it could not "conclude that any longer applicable statute had been clearly established for *Bivens*-type cases at the time [petitioner's] cause of action arose here, which would make retroactive application of the rule unfair, or otherwise violative of the principles of *Chevron* v. *Huson*" (Pet. App. 7a). The court accordingly affirmed dismissal of petitioner's complaint on statute of limitation grounds.

ARGUMENT

Petitioner contends that his *Bivens* action is not subject to Kentucky's one-year statute of limitation for personal injuries. He further contends that, even if that is the appropriate statute of limitation, the district court should not have applied that limitation period in this case. The court of appeals correctly rejected these contentions. Its decision is consistent with *Wilson* v. *Garcia, supra,* and does not conflict with any decision of this Court or another court of appeals. There is, accordingly, no warrant for further review.

1. "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is

not inconsistent with federal law or policy to do so." *Wilson* v. *Garcia*, 471 U.S. at 266. In *Wilson*, this Court held that the timeliness of actions brought under 42 U.S.C. 1983 alleging deprivation of constitutional rights should be determined by reference to the local statute of limitation governing tort claims for personal injuries. In this case, the court of appeals applied the reasoning of *Wilson* to *Bivens* actions, and concluded that the same statutes of limitation should apply.

This result is both sensible and correct. Section 1983 actions against state officials and *Bivens* actions against federal officials are closely analogous remedies. The Court has frequently relied simultaneously without comment or distinction on *Bivens* and Section 1983 cases. *E.g.*, *Forrester* v. *White*, No. 86-761 (Jan. 12, 1988), slip op. 5; *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n.30 (1979); *Butz* v. *Economou*, 438 U.S. 478, 496-504 (1978). The lower courts follow the same practice. See, *e.g.*, *Ellis* v. *Blum*, 643 F.2d 68, 84 (2d Cir. 1981).

Thus, it is wholly appropriate that *Bivens* actions and Section 1983 actions should be subject to the same statutes of limitation. *Bivens* claims, like Section 1983 claims, "can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations" (*Wilson*, 471 U.S. at 272-273). Both remedies "encompass[ ] a broad range of potential tort analogies, from injury to property to infringements of individual liberty" (*id.* at 277). But both remedies ultimately stress protection of *personal* constitutional rights. Compare *Wilson*, 471 U.S. at 277-279, with *Bivens*, 403 U.S. at 389-390, 391-392, 395-397. Thus, *Bivens* claims, like Section 1983 claims, "are best characterized as personal injury actions" (*Wilson*, 471 U.S. at 280) for purposes of borrowing an appropriate state statute of limitation. See also *Goodman* v. *Lukens Steel Co.*, No. 85-1626

(June 19, 1987) (applying *Wilson*'s reasoning to 42 U.S.C. 1981 actions).

Since this Court decided *Wilson*, only the Sixth Circuit here, and the Second Circuit in *Chin* v. *Bowen*, 833 F.2d 21 (1987), have addressed the question whether *Bivens* actions should be subject to the same statutes of limitation as Section 1983 actions, and both have concluded that the same statutes of limitation should apply. Indeed, *Chin* rejected the precise arguments petitioner presents here, finding them "wholly unpersuasive" (*id.* at 23-24). Contrary to petitioner's assertion, there is no "clear conflict between the Sixth and the Ninth Circuits" (Pet. 14). The Ninth Circuit encountered the issue in *Gibson* v. *United States*, 781 F.2d 1334 (1986), cert. denied, No. 86-676 (Jan. 20, 1987), but declined to decide it, stating:

> The Supreme Court has yet to decide whether its reasoning in *Wilson v. Garcia* means that *Bivens* claims should also be analogized to state personal injury tort claims for limitation purposes. Recognizing that *Wilson* may require a re-examination of *Marshall v. Kleppe*, [637 F.2d 1217 (9th Cir. 1980),] * * * *we do not find this an appropriate occasion for so doing:* even were we to overrule Marshall, we would not apply a shorter statute of limitations retroactively to bar claims such as plaintiffs' that were timely when filed.

Gibson, 781 F.2d at 1342 n.5 (emphasis added).[3] Thus, the Ninth Circuit has not determined whether *Wilson*'s reasoning should be applied to *Bivens* actions. See also *Chin*, 833 F.2d at 24 n.4 (noting that the Sixth Circuit "is the only

---

[3] In *Marshall*, the court of appeals held that *Bivens* actions arising in California are subject to the four-year catch-all period of limitations set forth in Section 343 of the California Civil Procedure Code (West 1982). See 637 F.2d at 1223-1224.

Court of Appeals to consider the question presently before us").

There is accordingly no post-*Wilson* conflict in the circuits on this question and no need for this Court to address it now.

2. Petitioner's contention that the district court should have prospectively applied its ruling is likewise not worthy of further review. "The usual rule is that federal cases should be decided in accordance with the law existing at the time of decision." *Goodman,* slip op. 4-5 (citing cases). "But *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971), advises that nonretroactivity is appropriate in certain defined circumstances." *Goodman,* slip op. 5. At a minimum, "the decision to by applied nonretroactively must establish a new principle of law, either by overruling clear past precedent * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (*Chevron Oil Co.,* 404 U.S. at 106 (citations omitted)). This case fails to satisfy even that test. The Sixth Circuit, upon reviewing its own precedents, stated:

> We are unable to conclude that any longer applicable statute had been clearly established for *Bivens*-type cases at the time plaintiff's cause of action arose here, which would make retroactive application of the rule unfair, or otherwise violative of the principles of *Chevron* v. *Huson.*

Pet. App. 7a-8a.[4] The Sixth Circuit's law concerning the appropriate limitation period for *Bivens* actions was perhaps

---

[4] Petitioner's contention (Pet. 14-15) that "Sixth Circuit law had a clear precedent" for the appropriate statute of limitation in his case is inaccurate. The two Sixth Circuit cases cited by petitioner (Pet. 15)—*Mason* v. *Owens-Illinois, Inc.,* 517 F.2d 520 (1975) and *Garner* v. *Stephens,* 460 F.2d 1144 (1972)—are not *Bivens* cases. They are, respectively, 42 U.S.C. 1981 and 42 U.S.C. 1983 actions.

unsettled, but that situation is insufficient to support nonretroactive application of the clarifying decision. See *Goodman,* slip op. 5-6; *Smith* v. *Pittsburgh,* 764 F.2d 188, 194-195 (3d Cir.), cert. denied, 474 U.S. 950 (1985).

Petitioner further contends that further review is warranted because the Sixth Circuit's refusal to give its decision retroactive effect conflicts with the Ninth Circuit's decision in *Gibson* v. *United States, supra.* The different results in petitioner's case and *Gibson*, however, simply reflect the Ninth Circuit's determination that application of *Wilson*'s reasoning to *Biven's* actions would result in the overruling of clearly established *Ninth Circuit* precedent. See *Gibson,* 781 F.2d at 1342 n.5, citing *Marshall* v. *Kleppe,* 637 F.2d 1217 (9th Cir. 1980). This circumstance does not reflect any disagreement among the circuits with respect to principles governing nonretroactivity determinations and does not present any question warranting this Court's review. Indeed, this Court has already given the lower courts ample guidance for applying *Chevron Oil Co.* principles. See *Goodman* v. *Lukens Steel Co., supra*; *Saint Francis College* v. *Al-Khazraji,* No. 85-2169 (May 18, 1987), slip op. 3-4.

Finally, there is no merit to petitioner's contention that the Sixth Circuit should have looked to the law of the D.C. Circuit—where the suit was originally filed—to make its retroactivity determination. As the Sixth Circuit explained (Pet. App. 7a-8a):

> Clearly, it would be inequitable, under *Chevron* standards, to permit the plaintiff to bring a suit in Kentucky that is barred by the Kentucky statute of limitations, upon the basis that he was originally justified, by a District of Columbia statute of limitations, in bringing the action in the District of Columbia, which has no interest in the parties or the claim.

Petitioner's contention on this score is tied to the particular procedural history of this case and presents no question of national or continuing importance justifying this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
JOHN F. CORDES
Attorney

FEBRUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60287

Supreme Court, U.S.
FILED
FEB 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-679

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALAN MCSURELY,

Petitioner,

—v.—

GEORGE W. HUTCHISON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

MORTON STAVIS
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6425

Counsel for Petitioner

TPP

REPLY TO RESPONDENT'S BRIEF
IN OPPOSITION

1) At page 7 of his response the Solicitor General says that "there is no need for the court to address it [the issue in this case] now" (emphasis supplied).

The inference is clear that even the Solicitor General acknowledges that at some future time it may be appropriate for the Court to address the issue in this case. That certainly appears likely considering that the lower court decision reflects a very sharp departure from Carlson v. Green, 446 U.S. 26 (1980); and that the Court has in the last three years, rendered three decisions seeking to delineate rules for the application of statutes of limitation - whether they be State or Federal, Wilson v. Garcia, 471 U.S. 261 (1983); Goodman v. Lukens Steel Co., 107 S.Ct. 2617 (1987); Agency

Holding Corp. v. Malley Duff and Associates, 107 S.Ct. 2759, but has left a gaping hole upon that issue in the context of a Bivens case. Since it appears that the issue in this case cannot long escape decision by the court, why should the court not take the case now? The issues are clear, sharp and fully developed. Continued litigation at the level of the Courts of Appeal will add nothing to the development of the issues as they now appear in this case. The Sixth and Second circuits appear to have taken one view and the Ninth Circuit seems to be leaning in the other. Why should the bench and the bar be deprived of a clear direction by the Court?

2) The Solicitor General argues that the Ninth Circuit in Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986) did not really decide but in

fact, merely skirted the issue as to whether Garcia v. Wilson should be applied to Bivens type actions. Whether or not that is so, the Ninth Circuit indicated its negative reactions to doing so by strongly relying on the non-retroactivity of any such rule - a position that the Sixth Circuit rejected in this case.

3) The Solicitor General's position conflicts with the careful judicial process of this court. In Garcia this Court established that 42 U.S.C. §1983 was a response to the campaign of violence formulated by the Klan. Therefore, it was appropriate to apply a uniform rule of statutes of limitation generally related to violent torts - i.e., personal injury actions. The Solicitor General argues that "Section 1983 actions against state officials and Bivens actions against

federal officials are closely analogous remedies" (Response p.5). Of course they are analogous remedies to the extent that they both allow damage actions. But the question is not the similarity of the remedies; it is rather the similarity - or not - of the causes of actions which form the grist of Bivens actions as contrasted with 42 U.S.C. §1983 actions.

The Court in Garcia was satisfied that application of limitation rules related to personal injury actions was fairly reasonable as to 42 U.S.C. §1983 actions. When the court does ultimately consider the issues in this case it will be required to make an evaluation of the proper standard to be applied to Bivens cases. It will do so not by assuming the conclusion without any factual support as has the Solicitor General, but by a careful

scrutiny of the facts showing the content of Bivens actions. If the court should grant this petition, it is the intention of the petitioner to make a careful analysis of all Bivens type litigation and the underlying judicial reasoning that gave rise to the remedy so that the court will have a sound factual basis upon which it may decide a) whether it should apply a uniform federal rule for a statute of limitation as it did in Agency Holding v. Malley Duff Associates or b) whether it should apply varying state rules. And if the court should choose the latter course, it will face and decide questions as to the source of state rules to be applied to Bivens type actions, e.g., personal injury limitation cases as decided by the Sixth Circuit, or a right created by statute as decided by the District

Court in its pre-Garcia decision in this case (Pet. 30-a-329).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON STAVIS
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, N.Y. 10012
(212) 614-6425
Counsel for Petitioner

Dated: New York, New York
February 23, 1987